Supreme Court, U.S.
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No. 90-1599

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DENNIS FELIX

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent argues for applying the "same transaction" test to determine whether successive prosecutions violate the Double Jeopardy Clause. He contends that "[o]nly [a requirement that all criminal charges arising from the same transaction be tried in a single proceeding] can avoid the evils forbidden by the Double Jeopardy clause of the Fifth Amendment." Br. 33. That position accurately states the implicit premise and necessary result of the Tenth Circuit's decision in this case. This Court, however, has repeatedly declined to adopt a "same transaction" test. See, *e.g.*, *Garrett* v. *United States*, 471 U.S. 773, 790 (1985). Most recently, in *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990), the case upon which respondent principally relies, the Court disclaimed any intention to adopt a "same evidence" or "same trans-

action" test. See *id.* at 2093 & n.12, 2094 n.15. Respondent's argument, and the Tenth Circuit's decision that respondent defends, are thus based on a theory of double jeopardy that this Court has consistently rejected.

2. In our opening brief (at 12-15), we explained that, under well-settled principles of the law of conspiracy, prosecution for a substantive offense and for a conspiracy to commit that offense are separate offenses and may be separately prosecuted. See *United States* v. *Bayer*, 331 U.S. 532, 542 (1947). Although respondent disputes that point (Br. 11-15), he does not cite any case in which a conspiracy prosecution was barred simply because the defendant had been separately prosecuted for one of the objects of the conspiracy. To the contrary, numerous lower courts, as well as this Court in *Bayer*, have affirmed convictions over the defendant's claim that his separate prosecution for conspiracy and for a substantive offense violated the Double Jeopardy Clause. See, *e.g.*, *United States* v. *Guthrie*, 789 F.2d 356, 358 (5th Cir. 1986); *United States* v. *Hines*, 713 F.2d 584, 586 (10th Cir. 1983); *United States* v. *Snell*, 627 F.2d 186, 188 (9th Cir. 1980), cert. denied, 450 U.S. 957 (1981); *United States* v. *Brown*, 604 F.2d 557, 559 (8th Cir. 1979); *United States* v. *Bosch*, 584 F.2d 1113, 1118-1119 (1st Cir. 1978); *United States* v. *Shelton*, 573 F.2d 917, 919 (6th Cir.), cert. denied, 439 U.S. 827 (1978); *United States* v. *Ricco*, 549 F.2d 264, 273 (2d Cir.), cert. denied, 431 U.S. 905 (1977).

Respondent challenges our reliance on *Bayer*, asserting (Br. 13) that *Bayer* has been overruled by *McNally* v. *United States*, 483 U.S. 350 (1987). This Court's opinion in *McNally*, however, did not discuss or even cite *Bayer*. *McNally* rejected an "intangible rights" theory of prosecution under the mail fraud statute, 18 U.S.C. 1341; it did not decide the quite different question whether the "intangible rights" theory is valid under the federal conspiracy statute, the statute at issue in *Bayer*. See *McNally*, 483 U.S. at 358-359 n.8. More importantly, because *McNally* raised no issue concerning the scope of the Double Jeopardy Clause or the validity of successive prosecutions for conspiracy and substantive offenses, *McNally* in no way questioned *Bayer*'s holdings with regard to those issues.

3. Respondent asserts that "the only evidence used to prove" intent in the Missouri trial was "the evidence of the Beggs lab and related transactions subsequently prosecuted in Muskogee, and the subject of this appeal." Br. 19 (emphasis omitted). Respondent also states that "the conduct presented at both trials is identical," Br. 27, that "no *new evidence* was developed between the trials or presented at the second trial," *ibid.*, and that "the government used the identical witnesses [and] the identical physical evidence" in both prosecutions, Br. 31.

The record of the two cases refutes respondent's assertions. The transcript of the evidence presented at the three-day Missouri trial—excluding opening and closing statements and jury instructions—takes up approximately 430 pages.[1] Approximately 28 of those 430 pages were devoted to the government's examination of witnesses concerning the Beggs, Oklahoma, methamphetamine lab. Similarly, the transcript of the evidence presented at the five-day Oklahoma trial—with the same exclusions—takes up approximately 900 transcript pages. Approximately 20 of

[1] We have lodged a copy of the transcript of the Missouri trial with the Court.

those 900 pages were devoted to the government's examination of witnesses concerning respondent's conduct in late August in attempting to set up the Missouri methamphetamine lab. Ten witnesses testified for the government at the Missouri trial. Only four of those were among the 15 witnesses who testified for the government at the Oklahoma trial. Thus, contrary to respondent's suggestion, the bulk of the government's proof at the Missouri trial did not concern the Oklahoma lab, and the bulk of the government's proof at the Oklahoma trial did not concern the Missouri attempt.

4. In our opening brief (at 16-20), we explained that *Grady* v. *Corbin* followed and relied on this Court's earlier decisions in *Harris* v. *Oklahoma*, 433 U.S. 682 (1977) (per curiam), and *Illinois* v. *Vitale*, 447 U.S. 410 (1980). Under *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), two crimes do not constitute the same offense within the meaning of the Double Jeopardy Clause if conviction of each requires proof of a fact not required for conviction of the others. *Grady*, *Harris*, and *Vitale* establish an exception to the strict application of the *Blockburger* test in a narrow range of cases. Thus, even if the second offense could theoretically be established without re-proving the first offense, successive prosecutions may be barred if the government will have to re-prove the first offense in order to prove the second. Cf. *Whalen* v. *United States*, 445 U.S. 684 (1980).

In our view, that is all *Grady* v. *Corbin* stands for. The basic double jeopardy issue in a successive prosecution case is whether the defendant has been twice prosecuted for "the same offense." Neither before *Grady* nor afterwards is it sufficient that the two prosecutions involved the "same evidence," the

"same transactions," or even the "same act or course of conduct." If the two prosecutions are not for the same criminal offense, it is irrelevant that the proof overlaps or the conduct that is the subject of the two separate prosecutions is largely or entirely the same.

Respondent argues (Br. 23-24) that our analysis is inconsistent with *In re Nielsen*, 131 U.S. 176 (1889). Contrary to respondent's contention, the decision in that case is consistent with conventional double jeopardy analysis, as later expressed in the *Blockburger* test. Indeed, the Court in *Nielsen* made precisely the point that Judge Anderson made in dissent in this case concerning the distinction between proof of the same conduct and proof of the same offense: "The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offence." *Nielsen*, 131 U.S. at 188.

The defendant in *Nielsen* was first charged with cohabitation, based on the allegation that he had lived as man and wife with two women continuously for several years. After he pleaded guilty to the cohabitation charge, the government sought to prosecute him for committing adultery with one of the two women. 131 U.S. at 177. The Court held the second prosecution barred by the Double Jeopardy Clause.

The Court in *Nielsen* treated the question before it as whether the offense of adultery was entirely encompassed within the offense of cohabitation, as defined in an 1882 federal statute directed at prohibiting polygamy. As the governing test, the Court adopted the formulation set forth in *Morey* v. *Commonwealth*, 108 Mass. 433, 435 (1871), which is exactly the same formulation that the Court later adopted in *Blockburger*: "A single act may be an offence against two statutes; and if each statute requires proof of

an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Nielsen*, 131 U.S. at 188, quoting *Morey*, 108 Mass. at 434. The Court then set about to demonstrate that the crime of adultery was not a separate offense from the crime of cohabitation under that test; that is, the Court proceeded to demonstrate that, in its view, adultery was a lesser included offense of cohabitation. While the Court's analysis in reaching that conclusion is somewhat obscure and may be questionable as a matter of statutory construction, what is clear is that the double jeopardy principle the Court applied was the traditional *Morey-Blockburger* test for determining whether two statutory crimes constitute the same offense and therefore may be the subject of successive prosecutions.

The Court explained that Nielsen would be entitled to relief "if the crime of adultery with which he was charged was included in the crime of unlawful cohabitation for which he was convicted and punished," that is, "if the adultery was only a part of, and incident to [the cohabitation]." 131 U.S. at 185. The Court concluded that it had "no doubt" that "the adultery charged in the second indictment was an incident and part of the unlawful cohabitation." *Id.* at 186-187. In order to reach that conclusion, the Court had to overcome the problem that, on its face, adultery appeared to have two elements that were not included within the crime of cohabitation: (1) that the parties to the adultery engaged in sexual intercourse; and (2) that one of the parties to the adultery was married.

The Court overcame the first obstacle by holding that unlawful cohabitation under the 1882 federal

statute required proof of "living together as man and wife." That status, the Court declared, "includes sexual intercourse." 131 U.S. at 187. Viewing sexual intercourse as an "incident" of the crime of cohabitation, the Court stated the governing rule as follows: "where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." *Id.* at 188.

The Court then addressed the second obstacle to its application of the *Morey* test. In response to the argument that adultery requires proof that one of the parties is married, and cohabitation does not, the Court stated that the 1882 cohabitation statute was aimed at polygamy and "is construed by this court as requiring, in order to obtain a conviction under it, that the parties should live together as husband and wives." 131 U.S. at 189. By construing the cohabitation statute in that way, the Court was able to conclude that the marriage element of the offense of adultery was in effect encompassed within the offense of cohabitation.

Thus, the Court concluded that all the elements of the offense of adultery were necessarily included within the offense of cohabitation, which rendered adultery in effect a lesser included offense of cohabitation. The Court's double jeopardy analysis in *Nielsen* is therefore entirely consistent with the *Morey-Blockburger* rule; accordingly, *Nielsen* does not remotely support petitioner's "same transaction" theory of double jeopardy or the decision of the Tenth Circuit in this case.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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